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MIGUEL ALVAREZ-MEZA

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE JEFFREY T. MILLER)

UNITED STATES OF AMERICA, Plaintiff, v. MIGUEL ALVAREZ-MEZA, Defendant.	Case No. 08cr0246 JM ***FIRST AMENDED*** MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTIONS

I. STATEMENT OF FACTS[1/]

Miguel Alvarez-Meza is accused of attempted entry after deportation in violation of 8 U.S.C. § 1326 (count 1), and making a false claim of United States citizenship in violation of 18 U.S.C. § 911 (count 2). Mr. Alvarez-Meza pleaded guilty to count 2 and will be sentenced on July 11, 2008. (The fast track offer estimated a criminal history category III and a joint recommendation of **18 months** imprisonment).

[1/] The facts contained in this motion are not concessions or admissions. Instead, they are based primarily on a review of the discovery provided by the government. Mr. ALVAREZ-MEZA reserves the right to challenge the accuracy of these alleged facts, and in no way admits their accuracy.

To support its charging Mr. Alvarez-Meza with attempted entry after deportation in violation of 8 U.S.C. § 1326, the government alleges that Mr. Alvarez-Meza was deported from the United States on November 5, 1996. *See* Indictment, p. 1-2; *see also* Discovery Bates Stamp ("BS") 22.[2/]

The statement of facts regarding the prior alleged deportation will be discussed below under argument Part III, entitled, "The Court Should Dismiss the Indictment Because Mr. Alvarez-Meza's Alleged Prior Deportation Is Invalid."

II. MOTION TO COMPEL DISCOVERY

Defendant moves for the production of further discovery pursuant to FED. R. CRIM. P. 12(b)(4) and 16. This request is not limited to items the prosecutor knows of, but rather includes all discovery listed below that is in the custody, control, care, or knowledge of any investigative or other governmental agencies closely connected to the prosecution. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *United States v. Bryan*, 868 F.2d 1032, 1035 (9th Cir. 1989).

1. Defendant's "A" File and Deportation Tapes. ***Mr. ALVAREZ-MEZA requests a complete and accurate copy of any and all "A" files the government alleges are his, and copies of any tape-recorded deportation hearings, and any transcripts thereof, in support of any deportation order executed against Defendant.***

The government must produce documents which are material to the preparation of a defense. *See* FED. R. CRIM. P. 16(a)(1)(C). Here, Mr. ALVAREZ-MEZA meets all the requirements for production under Rule 16. He asks to inspect his "A" file. The government is in possession of it. And, the following discussion demonstrates the materiality of the "A" file.

The "A" file plays a significant role in a prosecution under 8 U.S.C. § 1326. INS Officers routinely testify at trial that an "A" file contains *all* of the immigration contacts between the government and the individual. *See United States v. Blanco-Gallegos*, 188 F.3d 1072 (9th Cir. 1999) (an INS A-File identifies an individual by name, aliases, date of birth, and

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[2/] Bates Stamp citations refer to the pages of discovery as provided to defense counsel by the government.

citizenship, and all records and documents related to the alien are maintained in that file). Thus, the "A" file is presumptively material in § 1326 prosecutions.

Additionally, the "A" file may contain *Brady* material. *See Brady v. Maryland*, 373 U.S. 83 (1963). Armed with the "A" file, Mr. ALVAREZ-MEZA could use documents which may help his defense or point to specific documents that should be in the file. The absence of records is relevant and admissible. In fact, there is a specific hearsay exception dealing with absence of records. *See* FED. R. EVID. 803(10). Without an examination of the complete "A" file, however, Mr. ALVAREZ-MEZA cannot use this effective technique. Mr. ALVAREZ-MEZA can use absence of records to establish his innocence, or at least, impeach the government's witnesses. Thus, the complete "A" file is material to Mr. ALVAREZ-MEZA's defense and the failure to order inspection will effect his substantial rights.

Mr. ALVAREZ-MEZA expects the government will attempt to have an "expert witness" testify that based upon a review of Mr. ALVAREZ-MEZA's "A" file, Mr. ALVAREZ-MEZA would not have received permission to return to the United States, and based on a review of the "A" file, Mr. ALVAREZ-MEZA was not a United States citizen. If, however, the Court allows the testimony, the government must produce the materials — the "A" file — the expert uses to reach his or her opinions. *See United States v. Zanfordino*, 833 F. Supp. 429, 432-33 (S.D.N.Y. 1993). In *Zanfordino*, the defense requested discovery regarding the basis of the expert's testimony. The district court granted the request, noting that a cross examination conducted without that information implicated due process and the Confrontation Clause. 833 F. Supp. at 432. "If an expert is testifying based in part on undisclosed sources of information, cross-examination vouchsafed by that Clause would be unduly restricted." *Id.* In addition to the constitutional concerns, *Zanfordino* also relied, as does Mr. ALVAREZ-MEZA, on Rule 16, *Jencks* and Fed. R. Evid. 705. *Id.* at 432-33. Rule 16 requires disclosure of "the bases and reasons for [the expert's] opinions." FED. R. CRIM. P. 16(a)(1)(E). The rules of evidence impose a similar requirement: "[t]he expert may in any event be required to disclose the underlying facts or data on cross-examination." FED. R. EVID. 705. As the *Zanfordino* court observed, "delaying such disclosure until [cross examination] would merely prolong the trial." 833 F. Supp. at 433.

Finally, Mr. ALVAREZ-MEZA expects that government witnesses will use the "A" file to refresh memory. A defendant is entitled to inspect materials that a government witness uses "to refresh memory for the purpose of testifying, either — (1)while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice." FED. R. EVID. 612; *United States v. Sai Keung Wong*, 886 F.2d 252, 257 (9th Cir. 1989). While this Court has discretion to deny inspection when the witness reviews material before testifying, the Court must order inspection when the witness reviews materials while on the stand. *See Chalmers v. City of Los Angeles*, 762 F.2d 753, 761 (9th Cir. 1985) (written aids may be used to stimulate a recollection, but such writings must be made available for inspection and cross-examination by the adverse party); *Spivey v. Zant*, 683 F.2d 881, 885 n.5 (5th Cir. 1982) (habeas defendant entitled to inspect and use during cross-examination whatever portions of his file that his former attorney used to refresh his memory); *Marcus v. United States*, 422 F.2d 752, 754 (5th Cir. 1970) (well settled that if a witness uses any paper or memoranda while on the stand to refresh memory, the opposing side, upon demand, has a right to examine the paper or memoranda and use it in cross-examination); *National Dairy Products Corp. v. United States*, 384 F.2d 457, 461 (8th Cir. 1967) (finding prejudicial error where the court let the government refresh a witness's memory with a grand jury transcript and where the court did not let the defendant inspect the transcript; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233 (1940) (material used to refresh recollection must be shown to opposing counsel upon demand).

2. Defendant's Statements. The Government must provide Defendant with copies of: (a) *all* written or recorded statements made by Defendant; (b) the substance of any statements Defendant made which the Government intends to offer in evidence at trial; (c) any response by Defendant to interrogation; (d) the substance of any oral statements which the Government intends to introduce at trial and any written summaries of Defendant's oral statements contained in the handwritten notes of Government agents; (e) any response Defendant gave to any *Miranda* warnings which may have been given to Defendant; and, (f) any other statements by Defendant. The Government must reveal *all* statements made by a defendant, whether oral or written, regardless of whether the Government intends to make any use of those statements.

See FED. R. CRIM. P. 16(a)(1)(A); *id.* advisory committee's note (1991 amendments); *see also United States v. Bailleaux*, 685 F.2d 1105, 1113-14 (9th Cir. 1982).

3. Arrest Reports, Notes and Dispatch Tapes. Defendant also specifically moves for a copy of all arrest reports, notes, dispatch or any other tapes, and TECS records that relate to the circumstances surrounding Defendant's arrest or any questioning. This request includes any ***rough notes***, records, reports, transcripts or other documents in which Defendant's statements or any other discoverable material is contained. Such material is discoverable under FED. R. CRIM. P. 16(a)(1)(A) and *Brady v. Maryland*, 373 U.S. 83 (1963). Notably, the Government must produce arrest reports, investigators' notes, memos from arresting officers, dispatch tapes, sworn statements, and prosecution reports pertaining to Defendant. *See United States v. Riley*, 189 F.3d 802, 806-08 (9th Cir. 1999); FED. R. CRIM. P. 16(a)(1)(B)-(C); FED. R. CRIM. P. 12(i), 26.2. ***Defendant requests preservation of rough notes, whether or not the government deems them discoverable.***

4. Brady Material. Defendant moves for production of all documents, statements, agents' reports, and tangible evidence favorable to Defendant on the issue of guilt or which affects the credibility of the Government's witnesses. Impeachment and exculpatory evidence fall within the definition of evidence favorable to the accused. *See Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667, 676-78 (1985); *United States v. Agurs*, 427 U.S. 97, 102-06 (1976).

5. PINPOINT DISCOVERY REQUESTS FOR *Brady* Material.

a. acquired or derivative citizenship

Defendant moves for production of all documents, statements, agents' reports, and tangible evidence favorable to Defendant on the issue of guilt on the issue of "alienage." Specifically, a person born outside the United States is not an alien for purposes of 8 U.S.C. § 1326 if he or she has acquired or derived citizenship through a parent under the immigration laws of the United States.

Citizenship for one not born in the United States may be acquired "only as provided by Acts of Congress." *Miller v. Albright,* 523 U.S. 420, 424 (1998). Since the enactment of the first naturalization statute in 1790, our immigration laws have conferred derivative citizenship on the children of a naturalized citizen, provided certain statutorily prescribed conditions are met. *Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005).

As with all forms of citizenship, derivative citizenship is determined under the law in effect at time the critical events giving rise to eligibility occurred. *Minasyan*, 401 F.3d at 1075; *Montana v. Kennedy*, 366 U.S. 308 (1961). For example, under INA § 321(a),[3/] citizenship can be transmitted automatically upon a parent's naturalization. *Minasyan*, 401 F.3d at 1075. "The applicable law for transmitting citizenship to a child born abroad when one parent is a U.S. citizen is the statute that was in effect at the time of the child's birth." *Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1092 (9th Cir. 2005); *Scales v. INS,* 232 F.3d at 1159, 1162-63 (9th Cir. 2005); *United States v. Viramontes-Alvarado,* 149 F.3d 912, 915 (9th Cir. 1998).

"Until the claim of citizenship is resolved, the propriety of the entire [deportation] proceeding is in doubt." *Frank v. Rogers,* 253 F.2d 889, 890 (D.C. Cir. 1958). *See Minasyan v. Gonzales*, 401 F.3d 1069, 1075 (9th Cir. 2005) (citing *Frank v. Rogers* and *Ng Fung Ho v. White,* 259 U.S. 276, 284 (1922) ("Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact."). Where someone who has been ordered removed claims that he is a United States citizen and that he is therefore not subject to removal, the federal courts have jurisdiction to determine his nationality claim. *Minasyan v. Gonzales*, 401 F.3d 1069, 1074 (9th Cir. 2005). Because "the INA explicitly places the determination of nationality claims solely in the hands of the courts of appeals and (if there are questions of fact to resolve) the district courts," the federal courts are not required to give *Chevron* deference to the agency's interpretation of the citizenship laws. *Minasyan*, 401 F.3d at 1074. In addition, a claim to citizenship need not be exhausted. *Minasyan*, 401 F.3d at 1075. The statutory administrative exhaustion requirement of § 1252(d)(1) does not apply to a person with a non-frivolous claim to USC status even if he has previously been (illegally) deported by the government. *Minasyan*, 401 F.3d at 1075.

[3/] INA § 321 (8 U.S.C. § 1432) was repealed Oct. 30. 2000.

6. Any Information That May Result in a Lower Sentence Under the Guidelines. The Government must produce this information under *Brady v. Maryland*, 373 U.S. 83 (1963). This request includes any cooperation or attempted cooperation by Defendant as well as any information that could affect any base offense level or specific offense characteristic under Chapter Two of the Sentencing Guidelines. Defendant also moves for a copy of any information relevant to a Chapter Three adjustment, a determination of the defendant's criminal history, and information relevant to any other application of the Guidelines.

7. Defendant's Prior Record. Under FED. R. CRIM. P. 16(a)(1)(B), Defendant specifically moves for a copy of Defendant's prior criminal record, if any, as is within the possession, custody, or control of the government. Defendant specifically requests that the copy be complete and legible.

8. Any Proposed 404(b) Evidence. The government must produce evidence of "other acts" under FED. R. CRIM. P. 16(a)(1)(C) and FED. R. EVID. 404(b), 609. *See United States v. Vega*, 188 F.3d 1150, 1154 (9th Cir. 1999) (holding that Rule 404(b) "applies to all 'other acts,' not just bad acts"). This request includes any TECS records the Government intends to introduce at trial, whether in its case-in-chief, for possible impeachment, or in rebuttal. *Id.* In addition, under Rule 404(b), Defendant specifically requests the government "provide reasonable notice in advance of trial . . . of the general nature" of any evidence the government proposes to introduce under FED. R. EVID. 404(b) at trial. *See id.* at 1154-55. Additionally, Defendant requests that such notice be given ***three weeks*** before trial to give the defense time to adequately investigate and prepare for trial.

9. Evidence Seized. Under Fed. R. Crim. P. 16(a)(1)(C), the defense moves for a copy of discovery of evidence seized as a result of any search.

10. Tangible Objects. Under Fed. R. Crim. P. 16(a)(2)(C), Defendant specifically requests the opportunity to inspect and copy and test, if necessary, all other documents and tangible objects, including any books, papers, documents, photographs, buildings, automobiles, or places, or copies, depictions, or portions thereof which are material to the defense or intended for use in the government's case-in-chief, or were obtained from or belong to Defendant.

11. Evidence of Bias or Motive to Lie. Defendant moves for production of any evidence that any prospective Government witness is biased or prejudiced against Defendant, or has a motive to falsify or distort his or her testimony. *Pennsylvania v. Ritchie*, 480 U.S. 39, 57-58 (1987); *United States v. Strifler*, 851 F.2d 1197, 1201-02 (9th Cir. 1988).

12. Impeachment Evidence. Defendant moves for production of any evidence that any prospective Government witness has engaged in any criminal act whether or not resulting in a conviction and whether any witness has made a statement favorable to the defendant. *See* FED. R. EVID. 608-09, 613; *Brady v. Maryland*, 373 U.S. 83 (1963); *Strifler*, 851 F.2d at 1201-02; *Thomas v. United States*, 343 F.2d 49, 53-54 (9th Cir. 1965).

13. Evidence of Criminal Investigation of Any Government Witness. Defendant moves for production of any evidence that any prospective witness is under investigation by federal, state or local authorities for any criminal conduct.

14. Evidence Affecting Perception, Recollection, Ability to Communicate, or Truth Telling. Defendant moves for production of any evidence, including any medical or psychiatric report or evaluation, that tends to show any prospective witness' ability to perceive, remember, communicate, or tell the truth is impaired, and any evidence that a witness has ever used narcotics or any other controlled substance, or has ever been an alcoholic. *See Strifler*, 851 F.2d at 1201-02.

15. Witness Addresses. Defendant moves for production of the name and last known address of (1) each prospective Government witness, ***and*** (b) every witness to the crime or crimes charged (or any of the overt acts committed in furtherance thereof) who will *not* be called as a Government witness.

16. Name of Witnesses Favorable to the Defendant. Defendant moves for production of the name of any witness who made an arguably favorable statement concerning Defendant. *Chavis v. North Carolina*, 637 F.2d 213, 223 (4th Cir. 1980); *Jones v. Jago*, 575 F.2d 1164, 1168 (6th Cir. 1978); *Hudson v. Blackburn*, 601 F.2d 785 (5th Cir. 1979); *Jackson v. Wainwright*, 390 F.2d 288 (5th Cir. 1968).

17. Statements Relevant to the Defense. Defendant moves for disclosure of any statement that may be "relevant to any possible defense or contention" that my client might assert. *United States v. Bailleaux*, 685 F.2d 1105 (9th Cir. 1982). This includes in particular any statements by any percipient witnesses.

18. Jencks Act Material. Defendant moves for production in advance of trial of all material, including dispatch tapes, which the Government must produce pursuant to the Jencks Act, 18 U.S.C. § 3500 and FED. R. CRIM. P. 26.2. Advance production will avoid the possibility of delay at the request of defendant to investigate the Jencks material. A verbal acknowledgment that "rough" notes constitute an accurate account of the witness' interview is sufficient for the report or notes to qualify as a statement under § 3500(e)(1). *Campbell v. United States*, 373 U.S. 487, 490-92 (1963). In *United States v. Boshell*, 952 F.2d 1101 (9th Cir. 1991), the Ninth Circuit held that when an agent goes over interview notes with the subject of the interview, the notes are subject to the Jencks Act. *See also Riley*, 189 F.3d at 806-08. The defense specifically requests pretrial production of these statements so that the court may avoid unnecessary recesses and delays for defense counsel to properly use any Jencks statements and prepare for cross-examination.

19. Giglio Information. Pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), Defendant moves for production of all statements or promises, express or implied, made to any Government witnesses, in exchange for their testimony in this case, and all other information which could arguably be used for the impeachment of any Government witness.

20. Agreements Between the Government and Witnesses. Defendant moves for discovery regarding any express or implicit promise, understanding, offer of immunity, of past, present, or future compensation, or any other kind of agreement or understanding, including any implicit understanding relating to criminal or civil income tax, forfeiture or fine liability, between any prospective Government witness and any federal, state or local government. This request also includes any discussion with a potential witness about, or advice concerning, any contemplated prosecution, or any possible plea bargain, even if no bargain was made, or the advice not followed.

21. Informants and Cooperating Witnesses. Defendant moves for disclosure of the names and addresses of all informants or cooperating witnesses used, or to be used, in this case, and in particular, disclosure of any informant who was a percipient witness in this case or otherwise participated in the crime charged against Defendant. The Government must disclose the informant's identity and location, as well as disclose the existence of any other percipient witness unknown or unknowable to the defense. *Roviaro v. United States*, 353 U.S. 53, 61-62 (1957). The Government must disclose any information derived from informants which exculpates or tends to exculpate Defendant. Defendant also moves for disclosure of any information indicating bias on the part of any informant or cooperating witness. *Giglio*, 405 U.S. at 153-55. Such information should include what inducements, favors, payments, or threats were made to the witness to secure cooperation with the authorities.

22. Personnel Records of Government Officers Involved in the Arrest. Defendant moves for production of all citizen complaints and other related internal affairs documents involving any of the immigration officers or other law enforcement officers who were involved in the investigation, arrest and interrogation of Defendant. *See Pitchess v. Superior Court*, 11 Cal. 3d 531, 539 (1974). Because of the sensitive nature of these documents, defense counsel will be unable to procure them from any other source.

23. Government Examination of Law Enforcement Personnel Files. Defendant requests that the Government examine the personnel files and any other files within its custody, care or control, or which could be obtained by the government, for all testifying witnesses, including testifying officers. Defendant requests the attorney for the Government review these files for evidence of perjury or other similar dishonesty, or any other material relevant to impeachment, or any information that is exculpatory, pursuant to its duty under *United States v. Henthorn*, 931 F.2d 29, 30-31 (9th Cir. 1991). The obligation to examine files arises by virtue of the defense making a demand for their review. The Ninth Circuit in *Henthorn* remanded for *in camera* review of the agents' files because the government failed to examine the files of agents who testified at trial. This Court should therefore order the Government to review all such files for all testifying witnesses and turn over any material relevant to impeachment or that

is exculpatory to Defendant before trial. Defendant specifically requests that the prosecutor, not the law enforcement officers, review the files in this case. The duty to review the files, under *Henthorn*, should be the prosecutor's. Only the prosecutor has the legal knowledge and ethical obligations to fully comply with this request. *See United States v. Jennings*, 960 F.2d 1488, 1492 (9th Cir. 1992); *see also Kyles v. Whitley*, 514 U.S. 438, 437 (1995) (prosecutors have "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police").

24. Expert Summaries. Defendant moves for production of written summaries of all expert testimony the Government intends to present under Federal Rules of Evidence 702, 703 or 705 during its case-in-chief, written summaries of the bases for each expert's opinion, and written summaries of the experts' qualifications. FED. R. CRIM. P. 16(a)(1)(E)-(G).

25. Reports of Scientific Tests or Examinations. Under Fed. R. Crim. P. 16(a)(1)(D), Defendant moves for discovery of the reports of all tests and examinations conducted upon the evidence in this case, including but not limited to any fingerprint analysis or chemical tests of the substance found in the car my client was driving, that is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or which are intended for use by the government as evidence-in-chief at trial.

26. Residual Request. Defendant intends by this discovery motion to invoke the right to discovery to the fullest extent possible under the Federal Rules of Criminal Procedure and the Constitution and laws of the United States. This request specifically includes all subsections of Rule 16. Defendant requests that the Government provide Defendant and his attorney with the above requested material sufficiently in advance of trial to avoid unnecessary delay before trial and before cross-examination.

III. THE COURT SHOULD DISMISS THE INDICTMENT BECAUSE MR. ALVAREZ-MEZA'S ALLEGED PRIOR DEPORTATION IS INVALID

A. Deportation Tape Transcription

1. the following is a portion of the deportation tape pertaining to the group advisal of constitutional rights

[THE IJ IS SPEAKING TO THE GROUP AS A WHOLE].

IJ: I'm going to explain to you the rights you have at this hearing.

IJ: [Unintelligible] an attorney of your own choosing at no cost to the government. Before today's hearing, you should have received [unintelligible] legal service [unintelligible] for little or no charge. If you did not receive that list, please raise your hand.

IJ: If you ***do not understand*** the right to legal representation, please raise your hand.

IJ: If you have an attorney or [unintelligible] list who is going to help you with your case, please raise your hand.

IJ: If you'd like ***additional time*** to find legal representation [unintelligible], please raise your hand.

IJ: [Unintelligible] whether you have a legal right to remain in the United States. If you do not ***agree*** with the decision, you may file an appeal. If you file an appeal, a higher court will look at the decision I make in your case and tell me whether it's wrong or unfair. If you ***do not understand*** your right to appeal, please raise your hand.

2. the following is a portion of the deportation tape pertaining to Mr. Alvarez-Meza (Mr. Alvarez-Meza is referred to in the tape as Mr. Alvarez).[4/]

[AT NO TIME DURING MR. ALVAREZ-MEZA'S INDIVIDUAL DEPORTATION HEARING DOES THE IJ ASK HIM WHETHER HE WOULD LIKE TO HAVE AN ATTORNEY PRESENT].

[4/] Mr. Alvarez-Meza's case is called more than an hour after the group advisal of constitutional rights ***and*** his case is called after nine men's cases are called and decided.

IJ: Mr. Alvarez? . . . Uh, let's go over the parties [unintelligible] that are interested involving [unintelligible] . . .

IJ: [Unintelligible] or anything?

IJ: Are you married?

Alvarez: Si.

IJ: Do you have children?

Alvarez: No.

IJ: [Unintelligible] 212(C) requirement [unintelligible] it does appear that you [unintelligible] papers through your father. Depending on the date he filed or if he becomes a citizen quickly. If you take a deportation and your father becomes a citizen, then [unintelligible] ***depending on the crime***. What was your sentence on the crime?

[NO ADVISAL OF THE RIGHT TO AN ATTORNEY]

Alvarez: Excuse me?

IJ: What was your full sentence for that conviction?

Alvarez: [Unintelligible] six close to seven months.

IJ: So, it was over a year but you served about half?

Alvarez: Yeah.

IJ: It was over a year for your crime. **[NOT TRUE]**. If you accept deportation today, you're looking at, uh, a minimum, a minimum of 20 years before you're going to be able to get papers. Which means if you come back during that time, you're looking at a federal conviction for entry after deportation. Uh [unintelligible] deported.

IJ: [Unintelligible] I mean, if, are there, it's up to you. Any questions or anything you want to ask, uh, before [unintelligible] to help you make . . .

[THE IJ NEVER MENTIONS *WHAT* THE ALLEGED PRIOR CONVICTION ACTUALLY WAS OR WHETHER IT WAS A CRIME OF MORAL TURPITUDE. IN

FACT, AS HIGHLIGHTED BELOW, THE IJ SEEMS TO SUGGEST TO MR. ALVAREZ-MEZA THAT HIS CRIME WAS *NOT* ONE OF MORAL TURPITUDE].

Alvarez: Mr. Alvarez-Meza interrupts and states, "Can I get voluntary departure?"

IJ: You're looking at seven months. If you serve more than 180 days in prison, you can't get voluntary departure.

Alvarez: Even if you do it in the county?

IJ: Even in the county. [Unintelligible] voluntary departure ***or of moral character*** [unintelligible]. Section 101 [unintelligible] ***if not of moral character***, then it lists

[LONG PAUSE].

IJ: [Unintelligible] has been ***condemned*** [unintelligible] conviction to a penal institution. So that means it's a jail or a prison or a [unintelligible] between [unintelligible] together of 180 days or more so, technically, if you said you served 180 days, then, uh, I can't give you a voluntary return. [Unintelligible].

IJ: [Unintelligible] 6 months. So if [unintelligible]

[NOTABLY, IT APPEARS THAT IN 1996, A PERSON COULD NOT BE CONSIDERED ONE OF GOOD MORAL CHARACTER IF HE OR SHE WAS *CONFINED* TO A PENAL INSTITUTION FOR AN AGGREGATE OF 180 DAYS, NOT IF HE OR SHE WAS *CONDEMNED* TO A PENAL INSTITUTION. THEREFORE, THE IJ MIS-STATED THE LAW TO MR. ALVAREZ-MEZA.[5]

IJ: So, as I see it in your case, there are two choices. Uh, the choices are to go back to the bond hearing [unintelligible], try to get some bond, uh, see if you can get out. If you can't, then, uh, then find out exactly [unintelligible] papers [unintelligible] residents uh, or become a citizen before that [unintelligible] ground for a citizen. The other side, the other side is take a deportation but, uh, ***it's possible*** that ***your crime*** will bar you for 20 years from coming back.

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[5] See 8 U.S.C. § 1101(f) (a person cannot be considered, or found to be, one of moral character if, during the time good moral character is required, he "has been confined" to a penal institution for an aggregate of 180 days).

IJ: What do you [unintelligible]?
Alvarez: I'll take a deportation.
IJ: Okay, uh, [unintelligible] ***accept*** the decision or wish to appeal?
Alvarez: Yes? [Unintelligible]
IJ: Thank you, sir.

[NO MENTION OF WHAT HIS APPELLATE RIGHTS ARE AND OBTAINS INSUFFICIENT APPELLATE WAIVER].

B. The Notice to Appear ("NTA")

The April 17, 1996 NTA charges Mr. Alvarez-Meza with (1) being a citizen of Mexico and (2) entering the United States near San Ysidro, California in 1987 without inspection. The NTA ***does not*** charge Mr. Alvarez-Meza with a crime of moral turpitude or an aggravated felony or any criminal offense at all. The ***only*** charge is that he entered the United States without inspection.

C. Mr. Alvarez-Meza Has the Right to Collaterally Attack His Prior Deportation

"In a criminal prosecution under § 1326, the Due Process Clause of the Fifth Amendment requires a meaningful opportunity for judicial review of the underlying deportation." *United States v. Zarate-Martinez*, 133 F.3d 1194, 1197 (9th Cir. 1998). A defendant charged with illegal reentry after deportation has a Fifth Amendment right to collaterally attack his removal order because the removal order serves as a predicate element of his conviction. *See United States v. Mendoza-Lopenz*, 481 U.S. 828, 387-38 (1987) ("Our cases establish that where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative proceeding"). Under Ninth Circuit law, the issue is one for a district court. *United States v. Alvarado-Delgado*, 98 F.3d 492, 493 (9th Cir. 1996) (en banc) (the validity of a prior deportation is to be determined by the district court).[6]

[6] After the Supreme Court's decision in *Appendi v. New Jersey*, 530 U.S. 466 (2000), this issue should be one for the jury and Mr. Alvarez-Meza plans to raise the issue at the *in limine* motion.

To sustain a collateral attack under § 1326(d), a defendant must, within constitutional limitations, demonstrate that: (1) he exhausted all administrative remedies available to him to appeal his removal order; (2) the underlying removal proceedings at which the order was issued improperly deprived him of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair. *See United States v. Ubaldo-Figueroa*, 354 F.3d 1042, 1048 & fn. 6 (9th Cir. 2004) (summarizing and quoting requirements listed in U.S.C. § 1326(d)). An underlying removal order is "fundamentally unfair" if: (1) a defendant's due process rights were violated by defects in his underlying deportation proceeding; and (2) he suffered prejudice as a result of the defects. *Ubaldo-Figueroa*, 364 F.3d at 1048 (citing *Zarate-Martinez*, 133 F.3d at 1197).

Here, in charging Mr. Alvarez-Meza with a § 1326 violation, the government seeks to rely on the November 5, 1996 deport/removal order. Mr. Alvarez-Meza challenges its validity. The government cannot rely on that deportation because the IJ failed to: (1) personally advise Mr. Alvarez-Meza regarding his appellate rights and obtain a valid appellate waiver; (2) find out whether Mr. Avarez-Meza wanted an attorney present; and (3) properly determine Mr. Alvarez-Meza's eligibility for voluntary departure. Given these fundamental defects in the proceedings, the Court should grant Mr. Alvarez-Meza's motion to dismiss the indictment.

D. Mr. Alvarez-Meza's Deportation Was Invalid

Here, the deportation tape reveals manifest due process violations. First, the group advisements in the beginning of the tape were coercive in nature and ineffective. *See United States v. Lopez-Vasquez*, 1 F.3d 751, 754 (9th Cir. 1993) (holding that mass silent waivers are invalid); *see also Zarate-Martinez*, 133 F.3d at 1197-98 (a waiver of the right to appeal is not "considered and intelligent" where the IJ explains the right to appeal to a group of undocumented persons and then asks the group if they understood that they would have the right to appeal). Importantly, the group was never even asked if they understood their appellate rights. Instead, they were asked to raise their hands if they did not understand their appellate rights. Surely, this request tended to stigmatize the detainees who wished to appeal and gave the message that their right to appeal was disfavored. *Zarate-Martinez*, 133 F.3d at 1197-98.

Second, Mr. Alvarez-Meza was never individually asked whether he wanted an attorney during his hearing. The failure to advise Mr. Alvarez-Meza of his right to an attorney was exacerbated when the IJ stated that Mr. Alvarez-Meza may have papers through his father. At that point, the IJ should have told Mr. Alvarez-Meza that he could speak to an attorney regarding that issue and postpone his hearing and the IJ's findings until Mr. Alvarez-Meza received competent legal advise. This was never done.

Finally, Mr. Alvarez-Meza was never individually told that he had the right to appeal the IJ's decision, and Mr. Alvarez-Meza was never asked to waive his appellate rights on the tape. In fact, at the end of the hearing, the IJ asked Mr. Alvarez-Meza, "Okay, accept the decision?" The IJ does not tell Mr. Alvarez-Meza he has the right to appeal the decision and therefore, did not obtain an appellate waiver when he stated, "accept the deportation or wish to appeal?"[7/]

In 1996, Mr. Alvarez-Meza could have obtained relief in the form of a voluntary departure. For the reasons stated below, Mr. Alvarez-Meza meets all the necessary elements required to collaterally attack his prior deportation. As such, he prays this Court will dismiss the indictment.

1. exhaustion

An undocumented person may be barred under 8 U.S.C. § 1326(d) from collaterally attacking his underlying removal order as a defense to § 1326 charges "if he ***validly*** waived [his] right to appeal that order ***during*** the deportation proceedings." *United States v. Muro-Inclan*, 249 F.3d 1180, 1182 (9th Cir. 2001) (citations omitted) (emphasis added). The exhaustion requirement of § 1326(d), however, "cannot bar collateral review of a deportation proceeding when the waiver of [the] right to an administrative appeal [does] not comport with due process." *Id*. at1183-84. A waiver of the right to appeal a removal order does not comport with due process when it is not "considered and intelligent." *Id*.

Here, there was an insufficient waiver because the waiver could hardly be "considered and intelligent." The government cannot claim that Mr. Alvarez-Meza waived his appellate

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[7/] "An alien can not make a valid waiver of his right to appeal a removal order if an IJ does not expressly and ***personally*** inform the alien that he has the right to appeal." *Ubaldo-Figueroa*, 364 F.3d at 1049 (emphasis added).

rights because (1) the IJ failed to personally and intelligently inform him that he had a right to appeal his removal order and (2) obtained an invalid waiver ***over an hour*** and ***nine deportation hearings*** later than the invalid group advisal. *See Zarate-Martinez*, 133 F.3d at 1197 (holding that an undocumented person's due process rights were violated when the IJ failed to adequately inform him of his right to appeal and, thus, failed to obtain a valid appellate waiver). There is nothing in the deportation tape indicating that the IJ asked Mr. Alvarez-Meza if he personally understood his right to appeal the IJ's decision, or whether Mr. Alvarez-Meza understood the consequences of an appellate waiver. It is "mandatory" under the Due Process Clause that an IJ inform an undocumented person of his ability to appeal a removal order during a removal proceeding. *United States v. Arce-Hernandez*, 163 F.3d 559, 563 (9th Cir. 1998).

In *Zarate-Martinez*, for example, the defendant mounted a defense to his § 1326 charge by collaterally attacking his underlying deportation order on the ground that he did not make an intelligent waiver of his right to appeal the order. During removal proceedings, conducted in a group format, the IJ asked Mr. Zarate-Martinez and other group members: "You all understand that you will have the right to appeal." *Zarate-Martinez*, 133 F.3d at 1197. The group answered "yes." *Id*. Later, during an individualized hearing, the IJ asked Zarate-Martinez if he understood his rights, to which he replied, "yes." *Id*. at 1198. The Ninth Circuit held, nonetheless, that the INS violated Mr. Zarate-Martinez's due process rights because his statements did not qualify as a valid appellate waiver. *Id*.

Here, the IJ presiding over Mr. Alvarez-Meza's deportation hearing gave even less information than in *Zarate-Martinez*. The IJ did not obtain a valid appellate waiver, let alone one that was "considered and informed." Mr. Alvarez-Meza was told, "Accept the decision or wish to appeal?" He was not personally told what his appellate rights were, whether he understood his right to appeal or whether he actually ***waived*** his right to appeal. Simply stating that he accepted the decision does not qualify as a valid appellate waiver. Furthermore, during the group waiver, the IJ told more than nine men that if they did not ***agree*** with the decision, they could appeal. During his individual hearing, the IJ asked Mr. Alvarez-Meza whether he ***accepted*** the decision, which is contradictory to the IJ's prior statements and is confusing.

Moreover, the group advisal was asked in the negative, instead of the affirmative. The IJ told the group they could appeal the IJ's decision and asked them to raise their hand if they ***did not understand*** that right. The IJ did not determine whether Mr. Alvarez-Meza understood his right to appeal the IJ's decision and did not ask Mr. Alvarez-Meza whether he waived his appellate rights. Therefore, the alleged 1996 deportation was fundamentally flawed and Mr. Alvarez-Meza's failure to exhaust his administrative remedies is excused.

2. deprivation of judicial review

"To sustain a collateral attack on his removal order," Mr. Alvarez-Meza "must also demonstrate that the 'deportation proceedings at which the order was issued improperly deprived [him] of the opportunity for judicial review." *Ubaldo-Figueroa*, 364 F.3d at 1050 (quoting § 1236(d)(2)). Here, Mr. Alvarez-Meza "was deprived of the opportunity for meaningful judicial review" because the IJ never determined whether Mr. Alvarez-Meza understood his right to appeal the IJ decision and never let him invoke his right to appeal. *See id.* (finding that the IJ in that case "did not inform [Mr. Ubaldo-Figueroa] of his right to appeal his deportation order").

3. prejudice

Because the NTA did not allege any convictions at all, and because judicially noticeable documents do not show that he ***was confined*** to a penal institution for 180 days, Mr. Alvarez-Meza was wrongfully denied voluntary departure.

To establish prejudice, we do not have to show that relief actually would have been granted. Instead, we only need to show a "plausible" ground for relief from deportation. *Ubaldo-Figueroa*, 364 F.3d at 1048, 1050 (citing *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000).

Here, Mr. Alvarez-Meza had a plausible ground for relief in the form of voluntary departure. *See* 8 U.S.C. § 1254(e) (1996) (a person may receive voluntary departure if he is a person of good moral character for a period of five years preceding his application for voluntary departure); *see also* 8 U.S.C. 1101(f)(7) (a person may be one of good moral character if he does is not confined to a penal institution for an aggregate period of 180 days). Mr. Alvarez-Meza was not confined to a penal institution for an aggregate period of 180 days and thus, was eligible for voluntary departure.

E. Conclusion

For the foregoing reasons, Mr. Alvarez-Meza's prior alleged deportation in 1996 is invalid. Thus, the Court should dismiss the indictment.

IV. MOTION TO PRESERVE EVIDENCE

Request for Preservation of Evidence. Defendant specifically moves for the preservation of all dispatch tapes and any other physical evidence that may be destroyed, lost, or otherwise put out of the possession, custody, or care of the Government and which relates to the arrest or the events leading to the arrest in this case. *See Riley*, 189 F.3d at 806-08. Defendant further requests that the government be ordered to question all the agencies and individuals involved in the prosecution and investigation of this case to determine if such evidence exists, and if it does exist to instruct those parties to preserve it. This request also includes any material or percipient witness who might be deported or is otherwise likely to become unavailable (e.g., undocumented persons and transients).

V. LEAVE TO FILE FURTHER MOTIONS

Pursuant to FED. R. CRIM. P. 16, the Government has a continuing duty to disclose discovery to defense counsel. As additional information comes to light, the defense may find it necessary to file further motions or supplement these motions. Defendant hereby requests leave to do so.

VI. CONCLUSION

For the reasons stated above, Defendant respectfully requests that this Court grant the foregoing motions.

Dated: *June 26, 2008*

s/Kurt David Hermansen

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